Supreme Court, U.S.
F I L E D
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No. [illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

BILLY ASHLEY, Warden, Western Kentucky Farm Center, Petitioner,

versus

RICKY BYERLY, Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

RICKY BYERLY, # 75127
Bell County Forestry Camp
Rt. 2, Box 75
Pineville, Kentucky 40977
Respondent, Pro se

BARBARA TILLETT JONES
SUSAN ALLEY
Kentucky Corrections Cabinet
Office of General Counsel
State Office Building
Room 200
Frankfort, Kentucky 40601
502/564-3024
Counsel for Petitioner

BEST AVAILABLE COPY

NO. A-2 (92-2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BILLY ASHLEY, WARDEN
WESTERN KENTUCKY FARM CENTER, PETITIONER

VS

RICKY BYERLY, RESPONDENT

CERTIFICATE OF SERVICE

I, Ricky Byerly, pro-se, hereby certifies that on this 9th day of September, 1992, a copy of the foregoing Brief In Opposition To Petition For A Writ Of Certiorari in the above-entitled case was mailed to Ms. Susan Alley, Office Of General Counsel, 200 State Office Building, Frankfort, Kentucky 40601. I further certify that all parties required to be served have been served.

Ricky Byerly #75327

Ricky Byerley #75327

Bell County Forestry Camp
Rt.2, Box 75
Pineville, Kentucky 40977

Respondent, pro-se

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## REASONS FOR DENYING THE WRIT

### I. THE KENTUCKY COURT'S OPINION DOES NOT EXTEND THE PRINCIPLES OF THE DUE PROCESS CLAUSE BEYOND CONSTITUTIONAL LIMITS AND DOES NOT CREATE A CONFLICT IN KENTUCKY BETWEEN FEDERAL AND STATE COURTS.

The use of urine testing to detect and punish Kentucky inmates has previously been litigated in Federal Court. Before implementing any procedures for the taking and testing of urine specimens, the United States Magistrate, W. David King recommended that the Kentucky Department of Corections:

> (a) implement reasonable procedure in the urine donor's presence to assure the integrity and preserve the freshness of the sample.
>
> (b) implement reasonable procedures to record the chain of custody for the urine sample from the time the sample is taken, until it returns to the institution after examination....Higgs v. Wilson, (D.C. Ky. 1985), 616 F. Supp. 226 at 228.

After Magistrates' King's recommendation, the Corrections Cabinet instituted procedures which the Sixth Circuit Court of Appeals decided did maintain the integrity of the test. Higgs v. Bland, 888 F. 2d 443 (1989). This case gives a good insight into the procedures adopted. Id. 445.

The procedure outlined in Higgs v. Bland, supra, required a complete chain of custody be established. The Court cautioned the Corrections Cabinet that the integrity of the urine sample "must" be maintained. Id. 451.

In the case at bar, the Corrections Cabinet Chain of Evidence Form shows the sample being released by Western Kentucky's Complexs' Captain Robert Deboe to Bonnie Martin, a driver, but the form shows "no one else" receiving the sample after that. The Corrections Cabinet Chain of Evidence Form clearly states:

> " To demonstrate proper handling of the ___ specimen, a chain of custody of the sample

must be established. It is essential that this form be signed and dated by everyone handling the specimen. Do not give the specimen to anyone until it has been signed for. This form should accompany the sample at all times.

Please take notice that the directions for proper handling states "everyone" must sign and date the form. The specimen should not be given to "anyone" until it has been signed for, and the form should accompany the sample at "all times". It does not waive the signing of the form by anyone who is not employed by the Corrections Cabinet.

This chain of evidence form also has a lab report section which specifically states,

"applicable only when testing at LLCC Lab"

The LLCC lab is the only lab the Corrections Cabinet has, so, if the rest of the form was not meant to be completed by a lab outside of the Cabinet, it would state so on the form. Being that it is "not" stated, everyone handling the specimen is required to sign and date the chain of evidence form.

The failure to complete the Evidence Form could possibly be overcome had the Laboratories Chain of Custody Request been completed. This form was completed only as far as the Officer taking the sample. The space provided for the Laboratories Personnel receiving the specimen was not completed. The integrity of the test was not maintained because of this failure of the laboratory personnel to properly receive the specimen, and state that the seals where intact, and condition of the sample. Although positive test results on a urine sample constitutes "some" evidence of unauthorized use of drugs or intoxicants, this evidence "must" be of a reliable nature and consequence.

It does not matter whether Mr. Byerly was actually guilty of drug use, the means to bring about the end is the question. The Adjustment Committee

did not have the right to dispense with procedures and deprive Mr. Byerly of his due process rights.

> " Fact that matters which gave rise to punishment received by prisoner in State Penitentiary may well have been factually accurate could in no way be used as an excuse for failure to accord prisoner due process prior to imposition of punishment. Landman v. Poyster, 333 F. Supp. 621.

The Sixth Circuit Court of Appeals cautioned the Cabinet in Higgs v. Bland, 888 F. 2d 443 at 451 (1989), that the integrity of a urine sample "must" be maintained. This integrity required a "complete" chain of custody.

> " Prisoners can not be placed in punitive confinement areas to punish him for disciplinary infractions unless procedures employed by prison officials comport with minimum due process standards set out in applicable case. Maxton v. Johson, 488 F.Supp. 1030 (1980).

Maxton v. Johnson, supra, is applicable to the case at bar by way of the evidence procedures not being followed which where established through Higgs v. Wilson,(D.C. Ky. 1985), 616 F. Supp. 226 at 228, and Higgs v. Bland, supra.

A judicial body recommended and approved the Cabinet's procedures through the Higgs cases. The United States Supreme Court states in Mackey v. Montrym, 99 S.Ct. 2612 at 2618 (1979), that:

> ".....we have generally required no more than that the predeprivation procedures used be....as a responsible governmental official warrants them to be."

Respondent, Byerly's due process rights were also violated when the Chairman of the Adujustment , Captain Deboe, set in on the hearing when he had been the Officer releasing the sample from the institution. The Corrections Policies and Procedures (CPP) number 15.6 (VI)(4)(a)(2) says:

> "Any...adjustment officer shall be disqualified in every case in which he has

participated as an investigating officer."

There can be no doubt that Captain Deboe participated as an investigating officer in the incident. It is probable that the incompleted evidence form was due to his not giving the driver proper instructions or the drivers failure to carry-out his instructions. CPP 15.6 (5)(b) states:

> "It is the policy of the Corrections Cabinet that all inmates due process rights are fully protected."

In the case at bar, Respondent's due process rights where not protected when he was convicted with an incompleted evidence form, and from Captain Deboe setting in as Chairman of the Adjustment Committee that found Mr. Byerly guilty.

## CONCLUSION

The Respondent respectfully request that this Court deny the Petitioners request for the Writ of Certiorari because there is clearly no conflicting decisions on whether a chain of custody for a urine sample is required to support a prison disciplinary committee's findings of guilt on a charge of unauthorized use of drugs or intoxicants.

THEREFORE, the Writ of Certiorari should not be granted.

Respectfully submitted,

Ricky Byerly

Ricky Byerly #75327

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